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No. 940

In the Supreme Court of the United States

October Term, 1940.

UNITED STATES OF AMERICA, EX REL. JOSEPHINE JUMP, *NEE* STRIKEAXE, AND JOE S. McGUIRE, GUARDIAN OF JAMES STRIKEAXE, AN INCOMPETENT,

Petitioners,

vs.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. .....

UNITED STATES OF AMERICA, *EX REL.* JOSEPHINE JUMP, *NEE* STRIKEAXE, AND JOE S. McGUIRE, GUARDIAN OF JAMES STRIKEAXE, AN INCOMPETENT,

Petitioners,

vs.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES,

Respondents.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners pray that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia, affirming the judgment of the United States District Court in and for the District of Columbia. Petition for rehearing was denied February 15, 1941.

The judgment of the District Court, dated March 6, 1940, sustained the motion to dismiss the petition, and appears in the record, pages 38-39. The opinion of the Circuit Court of Appeals is not reported, but appears in the record, pages 43-50.....

Jurisdiction.

The judgment of the Circuit Court of Appeals denying the petition for rehearing was entered February 15, 1941. The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (Chap. 225, 43 Stat. L. 938, 28 U. S. C. A. 347) and subdivision (c) of paragraph 5 of Rule 38 of this court.

Statute Involved.

The statute involved is the Osage Allotment Act of June 28, 1906, (34 Stat. L. 539) sections one and six, *infra* (pages 24-25).

Questions Presented.

1. The interpretation and application of sections 1 and 6 of the Osage Allotment Act (34 Stat. L. 539):

(a) The power and authority of the Secretary of the Interior in compiling the Osage roll provided for by said act, to strike or eliminate names from the declared roll without notice or an opportunity to be heard essential to due process of law to those affected thereby;

(b) Error of court, upon motion, in dismissing a petition that concededly states a *prima facie* case for mandamus to restore the name of an Osage member that has been stricken or eliminated from the compiled roll by the unauthorized act of respondent's predecessor, based upon speculative defenses not pleaded or admitted.

(c) Whether the court, in considering the statute effective June 28, 1906, which provides in plain language the tribal roll in the office of the Osage Indian Agency as it existed on January 1, 1906, is declared to be the roll of the tribe and to constitute the legal membership there-

of for the purpose of the act, without any distinctive mention of whether the persons are living or deceased, except in a subsequent section it is provided the benefits provided for of any deceased member of the tribe shall descend to his heirs, may, upon motion to dismiss, enter into speculative fields in search of meaning different from the plain language employed to raise a doubt to resort to construction, and then substitute construction for legislation and read into the statute language not therein contained.

(d) Whether the court upon motion to dismiss may consider affirmative defenses not admitted nor apparent from the record, to-wit: *(1)* Administrative construction of the statute; *(2)* inequitable consequences based upon laches.

Statement.

The petitioners instituted this action in their own behalf against respondent in his official capacity to restore certain rights and benefits conferred under the Osage Allotment Act, *supra,* of which they, as heirs of Bennie Strikeaxe, have been deprived by the predecessor of respondent acting wholly without authority of law in that he arbitrarily eliminated the name of Bennie Strikeaxe from the compiled roll designated by Congress, without notice or an opportunity to be heard essential to due process of law. (R. 1-23) The respondent filed a motion to dismiss. (R. 24-25) The facts, as disclosed by the petition (R. 1-23), are admitted by the motion and are as follows:

Petitioners are full-blood Osage Indians, children and sole heirs of Bennie Strikeaxe, now deceased, whose name appears upon the tribal roll of the Osage tribe of Indians as shown by the records of the United States at the Osage

Agency as it, the said roll, existed on the first day of January, 1906.

The mineral rights of the Osage tribe in said lands have been segregated and the title is in the United States and held in trust for the use and benefit of the tribe. (R. 2-3) The United States, by treaties and statutes, became obligated to pay the Osage tribe annuities and interest on money and to furnish supplies which have been distributed through the office of the Osage Indian agent; that section 4 of the Act of March 3, 1875 (18 Stat. 449), made it the duty of Indian agents to prepare an annual roll of members of the various tribes entitled to supplies; section 10 of said act made it the duty of the agent to keep a book of itemized expenditures and receipts and to forward quarterly a transcript of said book, with all notations thereon, to the Commissioner of Indian Affairs. The Act of August 19, 1890, (36 Stat. 336) directed the Secretary of the Interior to make quarterly payments of interest to members of the tribe. Thereafter, prior to each quarterly payment, the Osage agent prepared in triplicate rolls of the Osages on forms furnished by the Government, designated as the March, June, September and December Annuity Payrolls of each respective year and, when completed, said rolls constituted a roll of the tribe and the book of itemized expenditures as contemplated by section 10 of the Act of March 3, 1875 (R. 3-4); at the end of each quarter, one of the duplicate rolls was certified by the agent and forwarded to the Commissioner of Indian Affairs, and the other remained in his office.

The Secretary of the Interior on April 1, 1904, promulgated rules and regulations for revising said rolls. Sections 5 and 6 provided that all deceased Indians would be carried on the roll for one payment after death and the roll was revised each quarter in conformity with said rules afore-

said. (R. 4-5) The name of Bennie Strikeaxe had been upon the roll for many years and, after the adoption of said rules, was transcribed upon each roll during the years 1904 and 1905, being on the September, 1905, roll opposite Roll No. 582 and on the December, 1905, roll on page 13 thereof, opposite Roll No. 588, which disclosed the per capita payments of Bennie Strikeaxe and his son were receipted for by Foster Strikeaxe on December 13, 1905; and, under the heading "remarks" opposite the name of Bennie Strikeaxe, appears the notation, "588 Crazy." A photostat copy of page 13 of said roll as it existed on January 1, 1906, is attached to the petition as Exhibit "A." (R. 18) A duplicate of said roll and record was duly certified to on the last day of December, 1905, by the agent and forwarded to the Commissioner of Indian Affairs. The above constituted the official rolls and records of members of the Osage tribe up to and including the 6th day of March when the March, 1906, roll was prepared. (R. 5-7) No official record was kept of deaths of members, but said agent did keep an unofficial record of deaths after April 1, 1904, and on January 1, 1906, the record contained a list of 242 deaths but it did not include the name of Bennie Strikeaxe; that with the tribal roll and record of deaths existing as above set forth as of January 1, 1906, the Osage Allotment Act, *supra,* was introduced in Congress on February 21, 1906, and was passed and became a law on June 28, 1906. (R. 8-9-10)

The only power conferred upon the Secretary of the Interior to strike names from the roll was set forth in the proviso to section 1 of said act, *supra,* and limited to persons contained in a list filed by the principal chief of the tribe with the Secretary of the Interior, contending they were on the roll by fraud; no list was filed as to Bennie Strikeaxe. That in revision of the roll, it became the legal duty of the Secretary to transcribe the name of Bennie

Strikeaxe on the revised roll as a member of the tribe. (R. 10-11) The Secretary of the Interior in preparing a revised roll, through the Commissioner of Indian Affairs, directed a letter to the United States Indian Agent at the Osage Agency, dated January 30, 1908, to prepare in triplicate a complete roll of the Osage tribe of Indians and to include thereon the names of the tribal roll as it existed on January 1, 1906. (R. 12-13)

The Osage agent, in so far as he was directed to transcribe in triplicate the names from the tribal roll as it existed on January 1, 1906, was directed to perform purely a ministerial act. However, in violation of the instructions of the Commissioner of Indian Affairs, and without authority of law, he incorrectly transcribed a list of names from the tribal roll as it existed on January 1, 1906, and erroneously and without authority of law and in violation of the instructions of his superior omitted the name of Bennie Strikeaxe from said list, and erroneously certified the roll prepared by him contained all the names of the tribal roll as shown by the records in the specified office as it existed on January 1, 1906, when in truth and in fact said roll was incorrect as it did not contain the name of Bennie Strikeaxe which appeared upon the roll as above set forth; that by reason of the facts heretofore stated, the act of the Secretary in approving the revised roll on April 11, 1908, in so far as it eliminated the name of Bennie Strikeaxe, was illegal and void as said Secretary, under the act, had no authority or jurisdiction to eliminate said name in said manner. (R. 13-14)

That petitioners are wards of the United States and their property rights are derived from membership or inheritable interests in the Osage tribal property and are now and have been at all times in the past held, managed and controlled by the Secretary of the Interior under authority

conferred by Acts of Congress; that the United States at all times prior to June 28, 1906, and at all times thereafter has maintained an agent or superintendent of the Osages at the Osage Agency and, among the duties of said agent, has been the duty to look after, protect and care for the property rights of the Osage Indians; that in addition to being wards of the Government, petitioners, at the time of the passage of the Osage Allotment Act, were full-blood minors of tender years and the petitioner, James Strikeaxe, has been an incompetent ever since reaching his majority; that neither of said parties had any knowledge of the facts regarding the enrollment of their father or of his name appearing upon the tribal roll of the Osages as shown by the records of the Osage Agency on January 1, 1906; that the first knowledge they had was a short time before filing suit when they employed counsel to make an investigation and, in employing counsel, petitioners being full-blood Osages, their contract with their attorney was duly submitted and approved by the Secretary of the Interior with full knowledge that said attorney was employed to make an investigation to take such steps or necessary action as to enforce their rights. These petitioners have no remedy, legal or equitable, except by mandamus; that petitioners seek relief to require respondent: *(a)* to recognize the name of Bennie Strikeaxe on the final roll of the Osage tribe of Indians and, if necessary, to recompile said roll and include the name of Bennie Strikeaxe therein in accordance with the Act of June 28, 1906, *supra,* and to pay to petitioners as the lawful heirs of their deceased father their share in all future payments made to the Osage Indians to which their father would have been entitled if living; *(b)* to pay petitioners out of the applicable funds of the Osage tribe of Indians now on hand or that may be hereinafter received, an amount equal to the per capita shares of all annuities and other

payments made to members of the Osage tribe accruing to them under and by virtue of the Act of June 28, 1906, or, in lieu of said payments, to place said amount to their credit to be held and expended for their benefit as other restricted Indians.

The respondent's motion to dismiss (R. 24-25) is based upon the following grounds: *(1)* The Act of June 28, 1906, *supra,* deprived the court of jurisdiction; *(2)* failure to allege Bennie Strikeaxe was alive on January 1, 1906; *(3)* failure to join all members of the Osage tribe as defendants; *(4)* petition is without equity in that the tribal roll which it seeks to open and reform has been final since 1908 and has been the basis upon which tribal lands have been allotted and many millions of tribal funds have been distributed over a period of 29 years; and *(5)* petition is bad in substance in that it contains no prayer for specific relief. The trial court dismissed without specifying the particular grounds. (R. 38-39)

On appeal the Circuit Court of Appeals held the Act of June 29, 1906, *supra,* did not deprive the court of jurisdiction under the facts alleged in the petition and that the petition stated a *prima facie* case for relief. Although holding the petition stated a *prima facie* case for relief, the court held the relief by mandamus, not being a writ of right, could be denied upon equitable grounds or affirmative defenses, although not pleaded or admitted, and affirmed the judgment of the trial court.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In the interpretation and application of section 1 of the Osage Allotment Act, *supra,* in so far as it applies to the roll of the tribe, by reading into the statute language not therein contained;

2. That upon motion to dismiss, after holding the petition stated a *prima facie* case for mandamus, in not reversing the judgment of the trial court;

3. Upon motion to dismiss in considering affirmative defenses neither pleaded nor admitted and thereby depriving petitioners of the right to controvert the facts relied upon or to be heard thereon.

Reasons for Granting the Writ.

1. The court has decided a question of substance relating to the construction and application of the Osage Allotment Act which has not been, but should have been settled by this court, as the Court of Appeals has in the application of a plain and unambiguous statute resorted to construction and, in so doing, substituted construction for legislation and read into the statute language not therein contained.

2. When the Circuit Court of Appeals held the petition stated a *prima facie* case for relief, it became the duty of the court to reverse the judgment of the trial court. The failure of the court to do so involves a question of general importance and does not give proper effect to applicable decisions of this court but, in effect, has nullified paragraph (c) of rule 8 of this court effective September 1, 1938.

3. The Circuit Court of Appeals has not given proper effect to the applicable decisions of this court to the effect

that, upon motion to dismiss the court may not decide speculative affirmative defenses, neither pleaded nor admitted, nor apparent from the face of the petition. The question involved is of general importance in that the procedure adopted by the court deprives petitioners of the right to be heard essential to due process of law.

Wherefore, petitioners respectfully pray that a writ of *certiorari* issue to the United States Circuit Court of Appeals.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

A concise statement of the case has been incorporated in the petition for *certiorari, supra* (2-8). The case is of general importance for the decree is in principle directly contrary to prior decisions of this court and decisions of other circuit courts, in that in the application of the plain statute under which petitioners were conferred vested rights, the opinion denies to them those rights by an unauthorized act of the predecessor of respondent, made without notice or an opportunity to be heard essential to due process of law, by reading into the statute language not therein contained—and, further, upon motion to dismiss, adjudicated affirmative matters not pleaded nor admitted.

(1) The applicable part of section 1 of the Osage Allotment Act, *supra,* reads as follows:

> "That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on January 1, 1906, * * * is hereby declared to be the roll of the tribe and to constitute the legal membership thereof * * * and the tribal lands and tribal funds of said tribe shall be equally divided among the members of the tribe as hereinafter provided."

Section 6 of said act provides the lands, moneys and mineral interests of any deceased member shall descend to his legal heirs.

The words employed in section 1, *supra,* make it clear that those whose names were enrolled upon the tribal roll as it existed on January 1, 1906, subject to additions and eliminations set forth in the proviso (not material herein),

constituted the legal members who were to share in the division of the tribal property. *Levondale Lead & Zinc Co.* v. *Coleman,* 241 U. S. 432, 36 S. Ct. 644; *Kenny* v. *Miles,* 250 U. S. 58, 39 S. Ct. 417.

Bennie Strikeaxe being on the roll designated by Congress as constituting the legal members of the tribe, it follows: Upon passage of the Act of June 28, 1906, *supra,* the right to participate in the division of the tribal property was vested in Bennie Strikeaxe, if living, but being deceased on June 28, 1906, the date the act became effective, that right, under section 6 of the act, passed by descent to his legal heirs, the petitioners herein. It follows: The Secretary thereafter was without power or authority to strike said name from the roll or to eliminate said name from the compiled roll without notice or an opportunity to be heard essential to due process of law, and mandamus is the proper remedy to restore petitioners to *status quo. Garfield* v. *Goldsby,* 221 U. S. 249, 29 S. Ct. 62; *United States* v. *Wildcat,* 244 U. S. 111, 37 S. Ct. 561; *Brown* v. *Hitchcock,* 173 U. S. 473, 19 S. Ct. 485; *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 38 S. Ct. 99; *United States, ex rel. Turner,* v. *Fisher,* 222 U. S. 204, 32 S. Ct. 37; *Tiger* v. *Twin States Oil Co.,* 48 F. (2d) 509; *Memohah* v. *Schaffer Oil Co.,* 30 F. (2d) 665. The Circuit Court of Appeals recognized the principle of law announced in the above decisions and concluded the first ground of the motion that the Act of June 28, 1906, *supra,* deprived the courts of jurisdiction was not well taken and further concluded the petition stated a *prima facie* case for relief by mandamus.

(2) The above facts being established under settled law, the court erred in not reversing the case and directing the respondent to answer. *Kansas* v. *Colorado,* 185 U. S. 125, 22 S. Ct. 522; *Reconstruction Finance Corp.* v. *Central*

Republic Trust Co., (D. C.) 11 Fed. Sup. 976; *White* v. *Federal Radio Corp.*, (D. C.) 29 F. (2d) 113; *Ansehl* v. *Puritan Pharmaceutical Co.*, (C. C. A.) 61 F. (2d) 131; *Bronk* v. *Charles H. Scott Co.*, (C. C. A.) 221 Fed. 338.

The exception to the settled law that the court should overrule a motion to dismiss when the petition states a *prima facie* case is stated in the last case above cited, as follows:

> "If a bill, in and by its own averments, states a *prima facie* case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on a demurrer to the bill."

The facts as stated relied upon for dismissal are not adjudicated facts, but consist of speculative defenses or based upon admissions of facts set forth in an answer in *Ickes* v. *Pattison*, 65 App. D. C. 116, 80 F. (2d) 708. The admissions made by petitioners in said case cannot be binding on petitioners as adjudicated facts in this case. *Webster* v. *Fall*, 266 U. S. 507, 45 S. Ct. 148; *In re Heff*, 197 U. S. 488, 25 S. Ct. 506. It is clear under the authority of *Kansas* v. *Colorado, supra*, the Court of Appeals erred under the admitted facts in sustaining the motion to dismiss the petition.

(3) The opinion as a basis for affirming the judgment of the trial court is founded upon the theory that a writ of mandamus is not a writ of right and may be refused for reasons comparable to those which would lead a court of equity

in the exercise of a sound discretion to withhold an undoubted legal right. Citing *United States* v. *Dern*, 289 U. S. 352, 53 S. Ct. 614.

It may be accepted as a correct statement of law that upon considering a case upon the merits, a court may, in the exercise of sound judicial discretion, withhold the issuance of a writ of mandamus. However, this is far from holding that the court may disregard the allegations of a petition that states a *prima facie* case and withhold such a right upon a motion to dismiss. *United States* v. *Dern, supra*, was not decided upon motion to dismiss, but upon the merits after answer and an opportunity to be heard and present evidence.

Turner v. *Fisher, supra*, and *Duncan Townsite Co.* v. *Lane, supra*, involve the power of the Secretary to arbitrarily strike names from the roll. In both of said cases an answer was filed alleging the parties were on the roll by fraud. The petitioners in said cases admitted by demurrer the names were placed upon the roll by fraud. The court denied relief as the petitioners in said cases admittedly did not come into court with clean hands. In *Ickes* v. *Pattison, supra*, petitioners admitted by demurrer that Timothy Hamilton was never upon the roll in his lifetime, but had been placed thereon after death for a specific purpose.

Said cases lend no support to the theory the court may, on motion, adjudicate affirmative defenses not pleaded nor admitted and thus deprive the petitioners of the right to be heard or to controvert facts that may exist in the mind of the court. To do so would constitute a denial of due process of law just as effectively as if the party had never been given an opportunity to be heard. The basis of the opinion involved is to adjudicate facts not pleaded or admitted upon the theory the court believed said facts would constitute affirmative defenses. This is error.

(4) The court below in interpreting or applying the Osage Allotment Act, *supra,* states the literal language used by Congress made the roll as it existed on January 1, 1906, conclusive except for fraud. However the court concluded:

(a) It was manifest that Congress had no purpose of re-creating rights in the estate of a dead man which had been terminated by death and, therefore, the rights of these petitioners to recover depend upon establishing their father, Bennie Strikeaxe, was alive on January 1, 1906, and, if the Government had answered, which was preferable, and denied that Bennie Strikeaxe was alive on January 1, 1906, the burden of showing the contrary would have devolved upon the appellants. In this, the court erred.

It is the settled general law in the absence of statute that a member of a tribe has no alienable or inheritable interest in tribal property and his interest ceases upon death. *LaRoque* v. *United States,* 239 U. S. 62, 36 S. Ct. 22; *Gritts* v. *Fisher,* 224 U. S. 640, 32 S. Ct. 580. The rights of petitioners, however, are not based and founded upon the general law, but, on the contrary, upon a plain, clear statute which declares a certain roll to be the roll of the tribe for the purpose of making distribution to those whose names appear upon the roll and, if deceased, to their heirs. Congress knew or had reason to believe that some of the members whose names appeared upon the roll as it existed on January 1, 1906, were deceased on the date the act became effective, June 28, 1906. Under the general law the rights in the tribal property of all those whose names appeared upon the designated roll who were deceased prior to June 28, 1906, ceased and terminated upon their death. The only purpose of section 6 of the act, *supra,* was to recreate and re-establish in those who were deceased on June 28, 1906, the right to have their heirs participate in the distribution of the tribal property. The conclusion of the court is unsound both in fact and in law.

(b) The court below does not directly hold the Osage Allotment Act, *supra*, is ambiguous in so far as it declares a roll to be the roll of the tribe, but in application of the same the court indirectly places an interpretation thereon inconsistent with the applicable rules of construction announced by this court, and inconsistent with the words employed in the act, by reading into the clause:

> "Is hereby declared to be the roll of the tribe and to constitute the legal membership thereof,"

the language, "those living on January 1, 1906," and applies said clause as if it read:

> "Is hereby declared to be the roll of the tribe (and those living on January 1, 1906) to constitute the legal membership thereof."

In doing so the court erred and the opinion is in conflict with the former decisions of this court relating to applying an interpretation of statutes. In *United States* v. *Mo. Pac. Ry. Co.*, 278 U. S. 269, 49 S. Ct. 133, the court stated as follows:

> "* * * The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherance to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure upon conditions to raise doubt in order that result may be had to construction. It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation."

See also *Caminetti* v. *United States*, 242 U. S. 470, 37 S. Ct. 192; *United States* v. *Goldenberg*, 168 U. S. 95, 18 S. Ct. 3;

Red Wing Malting Co. v. *Willicuts,* 15 F. (2d) 626 (8 C. C. A.), wherein the court stated:

> "Courts must endeavor to arrive at meaning of statute from its language, and should not attempt to write new language therein."

The Circuit Court of Appeals for the District of Columbia, in *De Ruiz* v. *De Ruiz,* 88 F. (2d) 752, stated as follows:

> "While it is the duty of the courts in interpreting legislation to ascertain, if possible, the intent of the legislature, we must not overlook the general rule of statutory construction that such intent is to be found in the language employed. *United States* v. *Goldenberg,* 168 U. S. 95, 103, 18 S. Ct. 3, 42 L. ed. 394. When the words used are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning. *Caminetti* v. *United States,* 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442, L. R. A. 1917F 502, Ann. Cas. 1917B, 1168B."

See also *Reconstruction Finance Corporation* v. *Central Republic Trust Co., supra.*

Adherence to the statute as written leads to nothing impossible or plainly unreasonable. This court has never construed said section of the statute as to the exact question reflected in the opinion. However, this court has heretofore applied the statute as written without difficulty. *Kenny* v. *Miles, supra,* involved the question of whether there was any distinction between an allotment made to a living member of the tribe and a deceased member and, in referring to section 1 of the act, stated as follows:

> "* * * By its first section the act makes the tribal roll as existing January 1, 1906, with eliminations and additions not material herein, the authentic roll of the members for the purposes of the act. * * * all whose names were on the authentic roll were to share in the division of the tribal property * * * the death of a mem-

> ber entitled to an allotment does not extinguish his right * * *. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members. * * *"

If Congress had intended on June 28, 1906, when the act was passed that only those living on January 1, 1906, whose names appeared upon the tribal roll should share in the distribution, it would undoubtedly have used appropriate language to so express said intent and conferred upon someone power and authority to determine such a material fact. A radical departure of the settled law of the right of the court to read into plain language of the act words not therein contained, is not lightly to be inferred. It is clear Congress made the roll as it existed on January 1, 1906, conclusive except for fraud.

The motion to dismiss admits there was no record, official or otherwise, existing in the Osage Agency on January 1, 1906, to disclose the death of Bennie Strikeaxe, and no record was made thereof until February 21, 1906. (R. 7-8)

(5) The opinion cites *Ickes* v. *Pattison, supra,* in support of its right to read into the statute language not therein contained. The facts in *Ickes* v. *Pattison* are materially different from the case at bar. In said case the heirs of Timothy Hamilton alleged that he was born October 20, 1905, and his name appeared upon the tribal roll as it existed on January 1, 1906, and he was alive on said date. The answer alleged the records reflected Timothy Hamilton died November 20, 1905, without ever being enrolled and his name was placed upon the roll December 3, 1905, under a resolution of the Osage Council in accordance with a custom for the sole purpose of receiving one payment after death. The motion for judgment on the pleadings admitted the allegations of the answer. The admission that he was not on

the roll during his lifetime but had been placed thereon after death for a limited purpose was sufficient to deny relief. *Turner* v. *Fisher, supra,* and *Duncan Townsite Company* v. *Lane, supra.* The court in said case, however, in referring to the manner of compiling a roll, stated as follows:

> "We think it clear that the act provided for compiling from the records at the agency, as they existed on January 1, 1906, the final roll of members entitled to participate in the division of the tribal property."

Said language is inconsistent with any theory other than that the records as they existed on January 1, 1906, were conclusive in compiling the roll.

Clearly if, as stated above in *Ickes* v. *Pattison,* the compilation of the roll was to be made from the records at the agency as they existed on January 1, 1906, and that is a correct pronouncement of the law, the opinion in the instant case is erroneous and in conflict therewith. In the instant case it is admitted the records at the agency as they existed on January 1, 1906, disclosed Bennie Strikeaxe was enrolled and should have been placed upon the compiled roll. The effect of the holding in the instant case is that the Secretary in compiling the roll may disregard the plain provisions of the act and arbitrarily eliminate from the compiled roll names without notice or an opportunity to be heard essential to due process of law. This is clearly error. The opinions are in direct conflict.

(6) The court as a further ground for denying relief, held the question of whether Bennie Strikeaxe was living on January 1, 1906, was departmental construction. Departmental construction is not available on motion to dismiss, but constitutes an affirmative defense which must be plead under paragraph (c), Rule 8 of the Rules of this court relating to District Courts effective September 1, 1938, pro-

mulgated in accordance with the Act of June 19, 1934 (48 Stat. L. 1064). The only basis for departmental construction is the holding in *Ickes* v. *Pattison* under facts materially different. The demurrer in said case admitted the departmental construction pleaded. In addition thereto, the records in said case affirmatively disclosed Timothy Hamilton was born October 20, 1905, and died November 20, 1905, without ever being enrolled and was placed upon the roll after death for a specific purpose. Under said facts the holding in said case cannot constitute a precedent in the instant case, based upon materially different facts and records.

The general rule of law is that administrative construction is entitled to the highest respect and, if followed for a number of years, will not be disturbed except for cogent reasons. *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 49 S. Ct. 133; *Logan* v. *Davis*, 233 U. S. 613, 627, 34 S. Ct. 685, 5 L. ed. 1121. But the court is not bound by a construction so established. *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, 40 S. Ct. 504, 64 L. ed. 801; *United States* v. *Dickson*, 15 Pet. 141, 161, 10 L. ed. 689. The rule does not apply in cases where the construction is not doubtful. And, if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U. S. 568, 571, 5 S. Ct. 648, 28 L. ed. 1079; *Merritt* v. *Cameron*, 137 U. S. 542, 551, 552, 11 S. Ct. 174, 34 L. ed. 772; *United States* v. *Alabama R. R. Co.*, 142 U. S. 615, 621, 12 S. Ct. 306, 35 L. ed. 1134; *United States* v. *Healey*, 160 U. S. 136, 145, 16 S. Ct. 247, 40 L. ed. 369; *Studebaker* v. *Perry*, 184 U. S. 258, 268, 22 S. Ct. 463, 46 L. ed. 528; *Houghton* v. *Payne*, 194 U. S. 89, 24 S. Ct. 590, 48 L. ed. 888.

The petitioners plead a letter of the Commissioner of

Indian Affairs dated January 30, 1908 (R. 12-13), which reads in part as follows:

> "The roll should consist of *(1)* the names of the Osage tribal roll as it existed in your office on the first day of January, 1906; and *(2)* of the names of all persons, including adults and children, subsequently added thereto by direction of this office with the authority of the Secretary of the Interior in accordance with the provisions of section 1 of the act named.
>
> "The column for remarks in the roll should show the date and the file number of the authority for each name added to the roll 'as it existed on the first day of January, nineteen hundred and six'."

The letter above repels any inference inconsistent with the theory that the roll was disclosed by the records as they existed on January 1, 1906, was conclusive upon the agent in compiling the roll.

Certainly there is no language in the letter to support the theory the department, in construing said statute, had read into the plain language of the statute words not therein contained or that would confer upon the Secretary powers not conferred by the act, or that would justify the agent in compiling the roll to make a secret investigation and strike from the roll as it existed on January 1, 1906, names appearing thereon, or to eliminate said names from the compiled roll without notice or an opportunity to be heard.

The holding of the court relating to departmental construction upon motion to dismiss is clearly erroneous both in fact and law.

(7) The question of laches is an affirmative defense except when disclosed upon the face of the petition. The allegations of the petition must be taken as true. In *Oklahoma Oil Co.* v. *Bartlett,* 236 Fed. 488, it is stated: "No laches can be imputed to Jack Gauge. He and his land were under

the control of the Government." Laches is not a defense to perpetrate a fraud or injustice, but to prevent one. Petitioners are wards of the Government—their father was crazy on December 13, 1905—they, at the time of the passage of the act, were minors of tender years. It was the duty of the Government under the various Acts of Congress not only to protect them and their property rights, but to see that they obtained their just distributive share of the lands and funds and that other members did not receive in excess of their just portion. *Tiger* v. *Twin States Oil Co.*, 48 F. (2d) 509; *Heckman* v. *United States*, 224 U. S. 413, 32 S. Ct. 424. It is fundamental that a guardian cannot rely upon delay based upon his own wrong or neglect as a defense when he has in his possession tribal property to restore petitioners to *status quo.*

The court further concludes that due to the fact that the land had been allotted and had passed into many hands, relief should be denied. The petition in the case at bar alleges the mineral rights under these lands are still held in trust by the Government. The court, therefore, has a right to grant petitioners relief out of the tribal property in its possession sufficient to place them in *status quo. Gritts* v. *Fisher, supra.* The fact that the court might not, upon final hearing, give to petitioners all the rights they demand, does not justify the court in dismissing the petition. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 30 S. Ct. 10.

It is not intimated that the petitioners or their father were guilty of any wrong conduct. Their right is based and founded upon a statute that is plain—they have been deprived of that right by predecessor of respondent acting beyond his authority.

The opinion cites *Ellis* v. *Jump*, 100 F. (2d) 130, wherein petitioners sought to have certain pencil notations now

appearing on the tribal roll erased as they had been made thereon after January 1, 1906, by some person without authority of law and were no part of the roll as it existed on January 1, 1906. The case was disposed of upon motion on the sole ground the Secretary of the Interior was not a necessary party. The case has no application.

In the instant case the court has decided an important question of substance relating to the construction and appication of the Osage Allotment Act, *supra,* by reading into said plain and unambiguous statute language not therein contained, the force and effect of which has been to deprive these petitioners who are wards of the Government of valuable property rights conferred upon them by statute without notice or an opportunity to be heard essential to due process of law. There is further presented the right of these petitioners to be heard upon affirmative defenses relied upon by the court in sustaining motion to dismiss.

The duty of the United States under the peculiar trust relation which it bears to these petitioners cannot be satisfied by denying to them valuable rights which it was the duty of the Government to protect by reading into the statute language not therein contained or based upon affirmative defenses, although admitting the acts of the Secretary of the Interior which deprived these petitioners of these rights were without authority of law. Nor will that duty of the United States be fully satisfied unless the questions herein presented are fully decided by this court.

Wherefore, it is respectfully submitted that this petition should be granted.

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APPENDIX "A."

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Roll of the Osage Tribe of Indians, as shown by the Records of the United States in the Office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, *is hereby declared to be the Roll of the Tribe and to constitute the Legal Membership thereof; Provided,* That the Principal Chief of the Osages shall, within three months from and after the approval of this Act, *file with the Secretary of the Interior a list of the names which the Tribe claims were placed upon the Roll by fraud,* but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage Constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage Roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage Roll the names of all persons found by him, after investigation, to

be so entitled, whose applications were pending on the date of the approval of this Act; and the said Secretary of the Interior is hereby authorized to strike from the said roll names of persons or their descendants which he finds were placed thereon by or through fraud, *and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final,* and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eight Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians; *and the tribal lands and tribal funds of said tribe shall be equally divided mong the members of said tribe as hereinafter provided.*" (Italics ours, and parts in italics applicable herein.)

"SECTION 6. That the lands, moneys and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally."

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 940

UNITED STATES OF AMERICA, EX REL. JOSEPHINE JUMP, NEE STRIKEAXE, AND JOE S. MCGUIRE, GUARDIAN OF JAMES STRIKEAXE, AN INCOMPETENT, PETITIONERS

v.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 43–50) is reported in 117 F. 2d 769. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on December 30, 1940 (R. 50–51). A petition for rehearing filed on January

14, 1941, was denied February 15, 1941 (R. 51). The petition for a writ of certiorari was filed on April 11, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in the absence of an allegation that Bennie Strikeaxe was living on January 1, 1906, the Secretary of the Interior's refusal to recognize Strikeaxe as a duly enrolled member of the Osage Tribe of Indians under the Osage Allotment Act of 1906 should be overturned in a mandamus action instituted twenty-nine years after the Osage membership roll had been approved by the Secretary's predecessor and had (by the terms of the 1906 Act) become "final".

STATUTE INVOLVED

The pertinent provisions of the Osage Allotment Act of June 28, 1906, c. 3572, 34 Stat. 539, are set out in the Appendix.

STATEMENT

The petitioners, Josephine Jump and James Strikeaxe, are the children of Bennie Strikeaxe, a deceased Osage Indian (R. 2). They seek by mandamus to compel the Secretary of the Interior to recognize in Bennie Strikeaxe, and in them as his sole heirs, the right to participate in the distribution of Osage tribal funds (R. 16). They contend

that Bennie Strikeaxe was on "the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, *as it existed on the first day of January, nineteen hundred and six,*" [1] and that he was therefore entitled, by the express terms of the Osage Allotment Act of June 28, 1906, c. 3572, 34 Stat. 539, to share in the distribution of tribal lands and funds (R. 2–16).

The essential facts, as set out in the petition for mandamus, are these: Commencing in the '90's, Bennie Strikeaxe (by virtue of his tribal membership) received from the Government a quarterly annuity from the income of the Osage tribal land fund.[2] Prior to each quarterly payment in March, June, September, and December, the Osage Agent prepared in duplicate, on forms supplied by the Department of the Interior, a record known as the Annuity Pay Roll (R. 2–7). This pay roll contained the names of those persons entitled to participate in the distribution of tribal annuities, the age and sex of the annuitant, his or her number on the current and preceding pay roll, with appropriate spaces for signatures, dates of payment, and "remarks" (R. 18). Bennie Strikeaxe's name appeared on quarterly annuity pay rolls prior to and including the one for Decem-

[1] Italics supplied throughout this brief.

[2] See Act of August 19, 1890, c. 807, 26 Stat. 336, 344.

ber 1905, where he is listed as No. 588.[3] His annuity for that quarter was collected on December 13 (R. 18). No notation of his death was placed on that pay roll "until on or after February 21, 1906" (R. 8).[4] Notwithstanding the fact that Bennie Strikeaxe's name was on the Annuity Pay Roll "as it existed on January 1, 1906" (R. 8, 9), his name was not placed on the final tribal roll prepared by the local agent and approved by the Secretary of the Interior in 1908 (R. 12–14). Petitioners accordingly contend that their father's name was omitted without authority of law, that the Secretary should be required to include the name of Bennie Strikeaxe on the final roll, and that they are entitled to share as his heirs in all per capita distribution of Osage mineral royalties and other tribal property.[5]

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[3] His name was also included in the March 1906 pay roll pursuant to a provision of the Secretary's regulations allowing the name of a deceased Indian to be carried on one pay roll after death (R. 5). *Jump* v. *Ellis*, 100 F. 2d 130, 131 (C. C. A. 10).

[4] Petitioners have avoided any allegation that Bennie Strikeaxe was living on January 1, 1906. They simply allege that his name was on the Annuity Pay Roll "as it existed" on that date (R. 9, 11, 12), and they make no direct mention in this suit of the notation which appears on the December 1905 pay roll showing that Bennie Strikeaxe "Died Dec. 28/05". That fact, however, appears in a connected suit in which these same petitioners unsuccessfully sought to expunge that notation from the records of the Osage Agency. *Jump* v. *Ellis*, 22 F. Supp. 380 (N. D. Okla.), affirmed, 100 F. 2d 130 (C. C. A. 10), certiorari denied 306 U S. 645.

[5] Petitioners already share in their own right in all distributions of Osage Tribal funds (R. 2, 15).

The Secretary appeared and moved to dismiss the petition on various grounds (R. 24). The district court granted the motion to dismiss (R. 39), and the court of appeals affirmed (R. 50). It held that the Secretary was not required to include the name of Bennie Strikeaxe on the final roll unless Strikeaxe was alive on January 1, 1906, and that in the absence of any allegation that Strikeaxe was alive on that date the court would not grant the extraordinary remedy of mandamus, particularly in view of the long delay of the petitioners in bringing suit (R. 44–50). The affirmance was "without prejudice", presumably meaning without prejudice to petitioners' right to file a new petition alleging that Strikeaxe was alive on January 1, 1906 (R. 50).

ARGUMENT

1. The Osage Allotment Act, set out *infra*, p. 12, provided for the division of the entire tribal property among the members of the tribe.[6] Petitioners' contention is that under the Act one whose name was on the Osage Annuity Pay Roll for December, 1905, "as it existed on January 1, 1906," was en-

[6] In the absence of statutory provision to the contrary, the general rule is that the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, and that right is ended when membership in the tribe terminates either by death or by severance of tribal relations. *Wilbur* v. *United States*, 281 U. S. 206, 216; *La Roque* v. *United States*, 239 U. S. 62, 66; *Sizemore* v. *Brady*, 235 U. S. 441, 446; *Gritts* v. *Fisher*, 224 U. S. 640, 642.

titled to participate in the distribution of the tribal property whether or not he was in fact alive on the latter date. In holding to the contrary the court below followed its earlier decision in *Ickes* v. *Pattison,* 80 F. 2d 708, where precisely the same contention was made and rejected.[7] This Court denied certiorari in the *Pattison* case, 297 U. S. 713, and no new reason is now presented for reviewing the issue. Rather the further passage of time militates against upsetting the accepted construction of the statute.

The holding below follows the contemporaneous departmental construction of the Allotment Act, announced in 1906 in an opinion of the Assistant Attorney General for the Department of the Interior (quoted in *Ickes* v. *Pattison,* 80 F. 2d at 710):

> January 1, 1906, is the important date in this legislation. It is clearly intended that all members of the tribe *in being on that day* shall share in the distribution of the tribal property. The lands and funds of the tribe were communal property in which no individual held a separate interest or one that would descend at his death to his heirs. By death the interest of the individual in the tribal property terminated.

[7] In accord with the *Pattison* decision and the decision below in the present case is *Jump* v. *Ellis*, 22 F. Supp. 380 (N. D. Okla.), affirmed on another ground, 100 F. 2d 130 (C. C. A. 10), certiorari denied, 306 U. S. 645. See also *In re Pitt's Guardianship*, 115 Okla. 116, 117, 242 Pac. 1036 (1925).

> *Only those living January 1, 1906, had any interest therein that day.* None could claim any interest by inheritance, but held alone by virtue of his personal right of membership in the tribe. The membership of the tribe as it was constituted January 1, 1906, must be treated as the thing had in view by the law. *An individual who died before that date was not then a member of the tribe,* and for the purposes of division of the tribal property under this act it must be considered that his name was *erased* from the tribal roll *at the time of his death.*

Congress appears tacitly to have accepted this construction: although the Act has been repeatedly amended in other particulars,[8] Congress has expressed no dissatisfaction with the construction which the courts and the Department have placed on Section 1.

The Act did not, as petitioners insist (Pet. 12), confirm any single document as conclusive evidence of tribal membership. Congress did not make the quarterly Annuity Pay Roll for December 1905 a final record of tribal membership, as, for example, it did Dunn's roll of the Creek freedmen.[9] Instead the Osage Allotment Act provides that "the roll of

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[8] Joint Resolution of February 27, 1909, 35 Stat. 1167; Act of April 18, 1912, c. 83, 37 Stat. 86; Act of March 3, 1921, c. 120, 41 Stat. 1249; Act of April 12, 1924, c. 95, 43 Stat. 94; Act of March 2, 1929, c. 493, 45 Stat. 1478; Act of June 24, 1938, c. 645, 52 Stat. 1034.

[9] Act of June 28, 1898, c. 517, 30 Stat. 495, 503.

the Osage tribe of Indians, as shown by the *records* of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, 1906 * * * is hereby declared to be the roll of said tribe and to constitute the legal membership thereof." Moreover, Indians known to be dead continued to be listed on the annuity pay rolls for one quarter after death so as to provide moneys for burial expenses (R. 5). In view of this circumstance it is not to be supposed that Congress intended the December pay roll to constitute the membership roll of the tribe.

Knowing that the 1906 Act has been consistently construed as excluding Indians who died before January 1, 1906,[10] petitioners nonetheless make no averment in their petition for mandamus that Bennie Strikeaxe was alive, or that the records of the agency show that he was alive, on that date. They simply allege that he was on the Annuity Pay Roll "as it existed on January 1, 1906." Such an averment, in the light of the foregoing authorities, is insufficient to show that Bennie Strikeaxe was

[10] Petitioners are represented in this case by the same counsel who represented them in the district court in Oklahoma, where they sought without success to expunge from the records of the Osage Agency the notation that Bennie Strikeaxe had "Died Dec. 28/05." *Jump* v. *Ellis*, 22 F. Supp. 380.

wrongfully deprived of an Osage "headright" or that he was unlawfully omitted from the final roll of the Tribe approved by the Secretary in 1908 (R. 12–14). As the court below held, to be entitled to mandamus the petitioners must show a clear right to the relief sought. Equivocal and inconclusive allegations will not suffice. *Life and Fire Insurance Co.* v. *Wilson,* 8 Pet. 291, 302; *Reeside* v. *Walker,* 11 How. 272, 289; *Redfield* v. *Windom,* 137 U. S. 636, 644; *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, 543. Thus the present complaint, by failing to allege that Bennie Strikeaxe was alive on January 1, 1906, omits a fact essential to the establishment of petitioners' claim.

It may be conceded, as petitioners contend (Pet. 2, 3, 12, 23), that a person who has been placed on an *approved* roll, and has thereby acquired certain property rights, cannot be removed therefrom without notice or an opportunity to be heard or without a right of appeal to the courts. *Garfield* v. *Goldsby,* 211 U. S. 249; see opinion of the court below (R. 47–48). But such are not the facts of the present case. Bennie Strikeaxe's name was never placed on the final roll approved by the Secretary of the Interior in 1908 (R. 14). The mere fact that it appeared on a "tentative roll" does not mean that it cannot be summarily omitted from the final roll. *Johnson* v. *Payne,* 253 U. S. 209, 211; cf. *Turner* v. *Fisher,* 222 U. S. 204, 209. Nor does

its omission render the approved roll any the less "final".

2. The equitable principles which guide a court in the issuance of mandamus (*United States* v. *Dern,* 289 U. S. 352, 359) would alone require denial of the writ in the present case. As the court below pointed out (R. 48–50), this action was begun twenty-nine years after the final roll of the Osage Tribe was approved. Under the Act both tribal lands and tribal funds were divided among the members of the tribe. *La Motte* v. *United States,* 254 U. S. 570, 572. If the Osage roll were now to be opened for review, it would be possible for every person named on the December pay roll but omitted from the final and approved roll to claim enrollment to the detriment of those already enrolled. The rights of these absent parties should not now be clouded at the behest of the petitioners. A claim involving such mischievous consequences cannot commend itself to a court exercising discretionary jurisdiction and guided by equitable principles. As Justice Brandeis remarked in *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311, mandamus does not issue "to direct an act which will work a public or private mischief."

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a

question of general importance. The petition should therefore be denied.

Respectfully submitted.

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APRIL 1941.

APPENDIX

Pertinent provisions of the Osage Allotment Act of June 28, 1906, c. 3572, 34 Stat. 539:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: *Provided,* That the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of

December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided

among the members of said tribe as hereinafter provided.

SEC. 2. That all lands belonging to the Osage tribe of Indians in Oklahoma territory, except as herein provided, shall be divided among the members of said tribe, giving to each his or her fair share thereof in acres, as follows:

First. Each member of said tribe, as shown by the roll of membership made up as herein provided, shall be permitted to select one hundred and sixty acres of land as a first selection; * * *

SEC. 4. * * * First. That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage Tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, * * *.

SEC. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interest, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be is-

sued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interest, except as hereinbefore provided.

SEC. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

* * * * *

SEC. 12. That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.

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